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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

396

No. 396

CITY OF MORGANTOWN, WEST VIRGINIA, A MUNICIPAL CORPORATION,

Petitioner,

vs.

ROYAL INSURANCE COMPANY, LIMITED,

Respondent.

UPON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER ON HEARING

W. G. STATHERS,
Clarksburg, West Virginia,
Attorney for Petitioner.

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REPLY BRIEF FOR PETITIONER ON HEARING

The petitioner elected to stand upon the brief and reply brief filed upon the petition for a writ of certiorari herein and did not file an original brief upon hearing. Respondent having filed a brief upon hearing, this reply is deemed appropriate.

Opinion of the Circuit Court of Appeals

The opinion of the Circuit Court of Appeals delivered on August 31, 1948, now having been reported, it is here noted that the same will be found in 169 F. 2d 713.

The decision of that Court dismissing our appeal is based solely on the conclusion that mutual mistake is not

available as a defense at law, relying upon dictum in *Union Mutual Life Insurance Company* v. *Mowry*, 96 U. S. 544, 24 L. Ed. 674, and the further conclusion that parol evidence is not admissible at law to prove a mistake, relying upon a Federal case, *Allegheny Valley Brick Company* v. *Raymond*, 219 Fed. 477 (CCA 2, 1914) and an early Wisconsin case, *Garage Equipment Company* v. *Danielson*, 156 Wis. 90, 144 N. W. 184. It is upon this basis alone that the Circuit Court of Appeals distinguishes our case from the *Enelow*, *Adamos* and *Ettelson* cases, involving parol evidence of fraud as a defense to the contract.

The Compulsory Counterclaim

The respondent observes that petitioner did not challenge its action for reformation of the policy on the ground that respondent had an adequate remedy at law. (Respondent's Brief, page 3.) Our reply is that under Federal Rules of Civil Procedure there is provided only one form of action and that under these rules the defendant has no choice but to bring into the case its legal claim on the policy. (Rule 2, One Form of Action, Rule 13 (a) Compulsory Counterclaims.) There having been a loss on the policy, a total destruction of the property insured, a hangar at the Municipal Airport, and the loss having occurred from a fire, the sole question in this action is whether the policy written by respondent is a fire insurance policy. If it is not a fire insurance policy, then there is no recovery on the policy, now or ever.

Mistake at Law under the Parol Evidence Rule

The dictum in the *Mowry* case is not binding on this Court. It was not urged that there was any mistake in the policy. In the Federal case cited, since the court did not find evidence that sustained the alleged omission from the written

instrument, expressions regarding the parol evidence rule are also dictum. We can see no useful purpose to be served in attempting an analysis of the cases cited by respondent on this point. There are as many variations in statement of the parol evidence rule on the question of admissibility of evidence of mistake in actions at law as there are cases on the subject. The courts have at times resorted to such refinements and subtleties to permit the admissibility of such evidence or to exclude it as the particular case seemed to warrant. The early West Virginia cases cited by respondent admit parol evidence where the instrument is ambiguous but infer that, in equity, parol evidence is admissible regardless of ambiguity in the instrument.

Knowlton v. *Campbell*, 48 W. Va. 294, 37 S. E. 581.

The later West Virginia cases make no such distinction and recite the rule to be, both in law and in equity, that where the contract is unambiguous parol evidence is not admissible "in the absence of a showing of fraud or mistake".

Attorneys' National Clearing House v. *Greever*, 121 W. Va. 601, 5 S. E. (2d) 621, syl. 2;

Central Trust Company v. *Virginia Trust Company*, 120 W. Va. 23, 197 S. E. 12, syl. 1.

There are expressions in the earlier cases, seeming to exclude parol evidence of mistake in actions at law. We find the author in 32 C.J.S. section 978, page 938, summarizing the cases in this manner: "* * * while many authorities declare that evidence of mistake is admissible only in equity and not in a court of law, this rule is by no means universal, and there are many cases in the books, especially since the tendency has grown up to obliterate the sharp distinctions between law and equity in which parol evidence has been held admissible to show a mistake in reducing the agreement to writing, irrespective of the form of the action and whether it is in fact an action at law or a suit in equity."

See also the Virginia case there cited, *Massachusetts Bonding and Insurance Company* v. *Piedmont Service Station, Inc.*, (Va.) 181 S. E. 397, pages 400-401.

If the question of admissibility rests upon ambiguity in the written contract, the respondent having urged that there is such ambiguity in the writing of the policy in question, under cases cited by him, the evidence of mistake is clearly admissible.

However, the court will find that the tendency in the growth of the common law is to get away from such technical distinctions between law and equity in the admission of evidence of fraud and mistake as a defense, and the same are either treated as exceptions to the parol evidence rule or the parol evidence rule is considered as not applying in such instances.

The *American Law Institute Restatement of Contracts*, Volume 2, section 507, pages 975-976, shows the trend toward a simplified procedure where the question of reformation arises by treating the contract as reformed in a proper case, whether suit in equity or action at law, as the nature of the case makes appropriate. Where affirmative relief is not required, a denial of recovery on the policy will accomplish all that could be accomplished if the policy were reformed as prayed in the complaint.

The Right to Plead Mistake as a Defense to an Action at Law

The Federal practice does not permit the court to assume jurisdiction as a court of equity if there is a plain, adequate and complete remedy at law. Title 28 U. S. C. A. 384. Thus the adequacy of the remedy is the first test of jurisdiction in equity. If mistake is available as defense at law, as we contend, then the remedy is adequate. The respondent says the adequacy of the remedy depends upon the right to so plead at law at the time of the adoption of the Seventh Amendment to the Constitution. (Respondent's Brief, page

9.) If respondent does not take into consideration the development of the common law, in view of the decisions of this court hereinafter mentioned, it cannot be thus narrowly limited, but we again accept respondent's premise as a basis for the argument which follows.

There are so few instances of mistake, which do not also include an element of fraud, that we turn to the early writers on equitable procedure, such eminent authorities as Pomeroy and Chitty. We direct the court to an excellent discussion of the classification of mistake and fraud as either equitable or legal in *Pomeroy's Equity Jurisdiction (Fourth Edition)* Volume 1, section 119, pages 140, et seq. The author notes that the particular fact which gives rights to an equitable remedy may also be the occasion of a legal remedy simultaneously therewith and that this is especially true with reference to fraud, mistake and accident. The test which he adopts in determining whether equity jurisdiction is exclusive in a particular instance is whether the remedy is given by courts of equity alone without regard to the nature of the substantive right. *Pomeroy's Equity Jurisdiction, (Fourth Edition)* section 138, page 169, and section 139, pages 170, et seq.

In *Chitty on Pleadings (Sixteenth American Edition)* Volume II, page 373, in line with our contention that the exclusive jurisdiction in equity existed only where the remedy was afforded only by a court of equity—as where reformation was necessary to relief, we find the author saying:

> "One frequent ground for the interference of a court of equity is *mistake*, but as a court of law has no means of reforming the contract which is the relief in general granted by a court of equity, it will only interfere where there is no occasion to reform the contract, as where the true contract has been completely performed, and there is nothing more to be done by either party; * * *"

The Federal courts have long considered mistake as a defense at-law. "When there is a misunderstanding as to the terms of the contract neither party is liable in law or equity."

First National Bank of Quincy, Illinois, v. *Hall,* 101 U. S. 43, 25 L. Ed. 822, citing: *Utley* v. *Donaldson,* 94 U. S. 29, 24 L. Ed. 54, and other cases.

In the *Ettelson* case, the court refused to recognize the distinction between "equitable" and "legal" fraud, as recognized in the New Jersey practice, the same not being binding on the federal courts. 137 F. 2d 62, 64, (CCA 3, 1943.) And in its later decision, in the *Ettelson* case, that court notes: "Our holding on the former appeal was that any and all species of fraud may in the federal courts, contrary to the New Jersey courts, be submitted directly to the jury as a defense to the plaintiffs' recovery upon the insurance policies and that preliminary consideration of the counterclaim with a view to the entry of a decree cancelling the policy sued on was not in accord with federal practice." 146 F. 2d 660, 663 (1947).

The lower federal courts have so understood and applied the *Ettelson* case:

Logan v. *Holman,* 7 F. R. D. 596, pages 597-599;

Garman v. *Metropolitan Life Insurance Company,* 7 F. R. D. 473.

In the case first cited, the court begins its examination of the question in this manner: "So that we must examine the issues, as crystallized by the pleadings herein, to determine whether under Federal Procedure, should the matter, because of the peculiar equitable circumstances involved, be tried by the court, as a chancellor, or should it be tried as a law action with questions of fact determined by the jury." The court concluded in line with the decisions of this court

that there is no distinction between equitable and legal fraud and holds that the defendant is entitled to a trial by jury as demanded by him.

We direct the court again to the test laid down in the *Saxe* (*Prudential Insurance Company* v. *Saxe*, 134 F. 2d 16) and other cases: Is the remedy at law adequate? If the respondent did not need to have the policy in question reformed, then it did not need to bring this action. Respondent says it "might have been flirting with disaster" had it waited until petitioner "saw fit" to sue upon the policy. (Respondent's Brief, page 8.) This is not a case where a petitioner was awaiting such time as it "saw fit" to institute an action. It was prohibited by the policy from bringing an action within sixty days after proof of loss. (R. 14.) The respondent does not say what "disaster" could have been anticipated and it is difficult for us to imagine any situation which could have prejudiced the respondent under the circumstances of this case, in view of the fact that the fire had already destroyed the subject insured under the policy and a mere denial of liability under the policy on the grounds set up in this action would have been notice to the petitioner of the claims which were presented for the first time in this action. We believe that the only purpose which could have been served, in so far as respondent is concerned, is the avoidance of a jury trial by the race to get into court under the assumed right to equitable relief, a practice which we believe should be discouraged here as it was in the *Saxe* case.

It is therefore respectfully submitted that the Circuit Court of Appeals erred in dismissing petitioner's appeal and that the order of August 31, 1948, should be reversed.

W. G. Stathers,
Clarksburg, West Virginia,
Attorney for Petitioner.